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In the Supreme Court of the United States

OCTOBER TERM 1964

No. 978

R. RAY ROBBINS CO., INC.,
Petitioner,
vs.
VALLEY NATIONAL BANK OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition

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Respondent's Brief in Opposition

Respondent, for the sake of brevity, adopts the sections of the Petition for Writ of Certiorari entitled OPINIONS BELOW and JURISDICTION. However, respondent does not believe that the remainder of the petition fairly presents the case. For that reason, respondent submits this brief in opposition to the petition for a writ of certiorari.

QUESTION PRESENTED

May the petitioner, who has delivered money to the payee through a mistake on the part of the petitioner, recover this money from a bank which has received this money from the payee in good faith, in the normal course of business

and without knowledge of the mistake of the petitioner and as security for a debt owed it by the payee?

STATEMENT OF THE CASE

1. Theories of Respective Parties

In its Complaint, seeking recovery of Thirty Thousand Dollars ($30,000.00) from Anthony Vaccaro and the Valley National Bank of Arizona, B. Ray Robbins Co. alleged that it was requested to make a compensating balance with the Bank for the benefit of Vaccaro, and that after Robbins made this deposit, the Bank, acting through a mistake (R.T. 88), used the funds as collateral security for a loan to Vaccaro contrary to the specific instruction of Robbins.

The Bank answered by stating that it did not request Robbins to make a compensating balance with it, and that there was never an agreement between the Bank and Robbins as to how this money was to be used. As to the allegation of mistake, the Bank claimed that it was not acting under any mistake concerning the transaction; and if there was a mistake, it was solely the mistake of Robbins or others for which the Bank was not responsible, and also that the Bank had materially changed its position by making a loan to Vaccaro.

Several other theories have also been advanced by Robbins, both during the trial and on the appeal. Robbins argued to the Ninth Circuit that one McCabe was the agent of the Bank and that his acts and statements bound the Bank; that the Bank of New York was the agent of the Bank and, therefore, its mistake in forwarding the funds was the mistake of the Bank; that Robbins' funds were a special deposit and therefore, it is entitled to recover this deposit when the Bank breached the contract creating the special deposit; and finally, that the Bank ratified the

actions of McCabe and the Bank of New York and, therefore, was bound by the acts of these persons. As stated by the Ninth Circuit, these theories are not supported by the evidence nor by the findings.

2. The Facts of This Case

In April, 1960, Vacarro needed money (R.T. 95). He approached Howard Nesbitt of the Valley National Bank in an attempt to obtain a loan (R.T. 96). Nesbitt informed Vaccaro that the Bank would grant the loan only if it were secured (R.T. 96-97).

Vaccaro then sought other methods of raising money. Prior to August 10, 1960 (R.T. 101), a Mr. McCabe of McCabe & Associates, a New York firm, called Vaccaro regarding a loan and mentioned a time deposit (R.T. 100). Vaccaro, not understanding the terminology of the financial world, told Mr. McCabe to talk to Nesbitt, and that Vaccaro would do what Nesbitt told him (R.T. 100). At the conclusion of this call, Vaccaro informed Nesbitt of McCabe's call (R.T. 101).

On August 10, 1960, Nesbitt wired McCabe stating that the Bank would accept a time deposit in the amount of Thirty Thousand Dollars ($30,000.00), *pledged as security* on a loan of Thirty Thousand Dollars ($30,000.00) to Vaccaro (Pl. Ex. 4-a, R.T. 86, R.T. 117).

Sometime after August 10, 1960, McCabe talked with Robbins concerning this transaction (Pl. Ex. 4, p. 7, R.T. 58). This was the first contact Robbins had with this transaction (Pl. Ex. 4, p. 11, R.T. 58). Robbins also contacted the Bank of New York prior to August 23, 1960, to determine whether or not it could transfer funds to the Bank. This was the first contact regarding this transaction had by the Bank of New York (Def. Ex. H, p. 2, 3, R.T. 139, 143). As a result of its conversations with McCabe, Robbins

proceeded to act. It did not contact Vaccaro (Pl. Ex. 4, p. 22, R.T. 58) nor did it contact the Bank (Pl. Ex. 4, p. 11, 23, R.T. 58, Request for Admission of Fact) prior to taking action, but acted solely on its conversations with McCabe. On August 23, 1960, Robbins delivered a certified check in the amount of Thirty Thousand Dollars ($30,000.00) and a letter of transmittal to the Bank of New York, (Pl. Ex. 4-b, R.T. 86; Def. Ex. J, p. 27, 29, R.T. 143). The Bank of New York advised the Bank by teletype that the Bank of New York was crediting it the sum of Thirty Thousand Dollars ($30,000.00) "by order of Anthony Vaccaro" (Def. Ex. J, p. 25, R.T. 143; Def. Ex. F, R.T. 129, 132).

On August 24, 1960, Vaccaro went to the Bank (R.T. 102; Stipulation, R.T. 138), where he signed a promissory note in the sum of Thirty Thousand Dollars ($30,000.00) (Def. Ex. C, R.T. 103, 105); endorsed in blank a certificate of deposit in the amount of Thirty Thousand Dollars ($30,000.00) (Def. Ex. B, R.T. 103, 105); and executed a general pledge agreement (Def. Ex. E, R.T. 103, 105) at which time Thirty Thousand Dollars ($30,000.00) was deposited to Vaccaro's account, curing an overdraft of approximately Seventeen Thousand Dollars ($17,000.00). (Def. Ex. D, R.T. 103, 105; Ex. 5-A, p. 10, R.T. 67; R.T. 102).

At this point, the transaction between Vaccaro and the Bank had been completed in accordance with their agreement (R.T. 96-97) and in accordance with Nesbitt's telegram to McCabe (Pl. Ex. 4-a), and in reliance upon the advice of credit received from the Bank of New York (Pl. Ex. 4-c). As of this date, the Bank did not have any knowledge of Robbins nor of its interest or participation in this transaction. As of August 23, 1960, neither the Bank nor Vaccaro requested Robbins to furnish a compensating balance (Pl. Ex. 4, p. 22, 23).

One week after the transaction had been completed (R.T. 118-120), Nesbitt received a letter from Robbins which contained instructions as to whom certain certificates of deposit should be made payable (Pl. Ex. 1, R.T. 11, 14). This was the *first* contact between Robbins and the Bank (Pl. Ex. 4, p. 11).

ARGUMENT

I. The petition presents no federal question nor raises an issue of constitutional import.

The petition for a writ of certiorari does not present a federal question nor does it raise any constitutional questions. Stripped to its essentials, the petition challenges the findings of fact that were adopted by the District Court, and upon review by the Ninth Circuit, were found to be "supported by substantial evidence and . . . not clearly or at all erroneous. . . ."[1]

This Court has clearly announced its position in cases of this kind. It has stated that:

> "For the (plaintiff) to succeed in this Court now, it must show that erroneous legal tests were applied to essential findings of fact or that the findings themselves were 'clearly erroneous' within our rulings on Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. (citing cases). We do not try the facts of cases *de novo*."[2]

Robbins has utterly failed to comply with this statement. There is no place in the petition where Robbins shows that the findings of fact are "clearly erroneous." All the petition does is state that the facts of the case should be

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1. *B. Ray Robbins Co. v. Valley National Bank of Arizona*, 338 F.2d 467, 470 (Ninth Cir. 1964).

2. *United States v. E. I. DuPont DeNemours & Co.*, 351 U.S. 377, 381; 76 S.Ct. 994 (1956).

construed in favor of Robbins. In such cases, this Court has stated:

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the (plaintiff) has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"[3]

The petition does not present a case of "clear error." It does not present a case creating a "definite and firm conviction that a mistake has been committed."[4] It does not present "an important question of federal law." It does not present a constitutional question. And it does not present a case where the courts have "departed from the accepted and usual course of judicial proceedings."[5] Therefore, this petition should be denied.

II. The decision of the Ninth Circuit Court of Appeals is not in conflict with the decisions of the Supreme Court of the United States, the Court of Appeals in the other circuits, nor is it in conflict with the majority of decisions in the States.

In its petition for a writ of certiorari, Robbins alleges that the decision of the Ninth Circuit Court of Appeals is in conflict with not only decisions of this Court, but also decisions in the other circuits and of various state court opinions. In an effort to substantiate this allegation,

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3. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177 (1949). See also: *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495, 70 S.Ct. 711 (1950).

4. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525 (1948).

5. Rule 19, Supreme Court of the United States Revised Rules.

the petition cites a great number of cases, all of which purport to hold that whenever a defendant has received money which is the property of a plaintiff, and the defendant has no proper claim to the money, then in equity and good conscience, the defendant will be required to repay the money to the plaintiff.

With that general rule of law the Bank has no quarrel. However, the facts of this case do not fit the application of that rule. The petition does not point out how this rule is applicable to the facts before the Court. Indeed, it cannot, because a close analysis of the cases relied upon by Robbins shows that the mistake of fact or law in each case arose directly between the parties to the lawsuit. In such fact situations, clearly the payor is entitled to restitution if the payee knew of the payor's mistake before receipt of the money, or if after the receipt of the same, the payee had not changed its position prior to learning of the mistake.

But in cases where the mistake of the payor is induced by a third party, and the payee is unaware of the mistake and receives the money in the regular course of business in good faith and for a valuable consideration, a different rule applies.[6] This rule is that where, as a result of a mistake of the payor, money is paid on account of another to a third party, who receives the same in good faith, in the normal course of business and without knowledge of the mistake and applies the same to a debt of the other, the payor cannot recover the money from the third person. *United States v. Hadden*, 192 F.2d 327 (Sixth Cir. 1951); *Knapp v. First Nat. Bank & Trust Co.*, 154 F.2d 395 (Tenth Cir. 1946); 40 Am. Jur., *Payment*, § 204, p. 855.

This rule has been applied in various situations. *Anno.*,

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6. See *Ball v. Shepard*, 202 N.Y. 247, 95 N.E. 719 (1911) for a good discussion of the distinction between the two rules.

114 A.L.R. 382. It has been applied where the funds were gained by the payee through mistake,[7] fraud and/or misrepresentation,[8] and in cases where banks have received the sums either directly from the payor,[9] or from the third party,[10] and have deposited them to the account of the third party, thus curing overdrafts or using them as security for other loans.

The reason for the rule is this:

> ". . . to permit, in every case of the payment of a debt, an inquiry as to the source from which the debtor derived the money, and a recovery if shown to have been dishonestly acquired, would disorganize all business operations, and entail an amount of risk and uncertainty which no enterprise could bear." *Hatch v. Fourth Natl. Bank*, 147 N.Y. 184, 41 N.E. 403 at 404. "As between the payor and the payee there is no mistake which affects the validity of the transaction. *One receiving money* or negotiable securities in payment of, or *as security for, an existing debt*, is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security passing from hand to hand, to one who rightly receives it for a valuable consideration, should carry on its face its own credentials." (Emphasis supplied). *Spaulding v. Kendrick*, 172 Mass. 71, 51 N.E. 453 at 454.

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7. *Lake Gogebic Lumber Co. v. Burns*, 331 Mich. 315, 49 N.W. 2d 310 (1951); *Winslow v. Anderson*, 78 N.H. 478, 102 Atl. 310 (1917); *United States v. Hadden*, 192 F.2d 327 (Sixth Cir. 1951).

8. *Fidelity Mutual Life Insurance Co. v. Clark*, 203 U.S. 64, 51 L.Ed. 91, 27 S.Ct. 19 (1906); *Spaulding v. Kendrick*, 172 Mass. 71, 51 N.E. 453 (1898); *Associates Discount Corporation v. Clements*, 321 P.2d 673 (Okla. 1958).

9. *Weiner v. Roof*, 19 Cal.2d. 748, 122 P.2d 896 (1942); *Jefferson County Bank v. Hansen Lumber Co.*, 246 Ky. 384, 55 S.W.2d 54 (1932); *Hullett v. Cadick Milling Co.*, 90 Ind. App. 271, 168 N.E. 610 (1929).

10. *Spaulding v. Kendrick*, 172 Mass. 71, 51 N.E. 453 (1898); *Hatch v. Fourth Natl. Bank*, 147 N.Y. 184, 41 N.E. 403 (1895).

In this case, Robbins, when it gave the funds to the Bank of New York for transmittal to Arizona, stated that these funds were requested by Vaccaro (Pl. Ex. 4-b). These funds were paid directly to the order of Vaccaro (Pl. Ex. 4-c). The Bank had no access to these funds at this time, other than to hold them until Vaccaro disposed of them as he saw fit. Vaccaro then went to the Bank, accepted these funds (Def. Ex. B) and offered this money to the Bank as security for a loan of a like amount. In accordance with its prior agreement with Vaccaro (R.T. 96-97; Pl. Ex. 4-a), the Bank entered into the loan. When Vaccaro received the proceeds of this loan, he deposited it to his account, thus curing an overdraft.

At this point in time, the Bank had no knowledge as to the existence of Robbins or its interest, if any, in this transaction. There was nothing on the advice of credit sent by the Bank of New York to place it upon notice of Robbins' interest. (Def. Ex. F; Pl. Ex. 4-c) There was nothing on the certificate of deposit given it by Vaccaro to indicate Robbins' interest (Def. Ex. B).

The Bank would not have loaned this money to Vaccaro if he had not offered some collateral (R.T. 96-97). On the strength of this collateral and without knowledge of Robbins, the Bank consummated the loan. Thus, the Bank received these funds in the ordinary course of business, without knowledge of where or how Vaccaro obtained this money, and only on the strength of this security did it enter into a new loan with Vaccaro. Accordingly to the rule established by the great weight of authority, the Bank, in cases of this kind, does not have to refund the money. *Hatch v. Fourth Natl. Bank*, 147 N.Y. 184, 41 N.E. 403 (1895); *Lake Gogebic Lumber Co. v. Burns*, 331 Mich. 315, 49 N.W.2d 310 (1951); 40 Am. Jur., *Payment*, § 204, p. 855.

SUMMARY

It is quite clear that the decision of the Ninth Circuit Court of Appeals is correct and that the petition for writ of certiorari should be denied. The facts as found by the District Court of Arizona and affirmed by the Ninth Circuit are substantiated by the evidence in this case. It is undisputed that Robbins, without first contacting the Bank in any way, sent money to Vaccaro, who, upon receipt of this money, transferred it by proper methods to the Bank.

It is further uncontradicted that the Bank, without knowledge of the existence of Robbins or the source of the funds, received the funds from Vaccaro in good faith and in the ordinary course of business, and after receipt thereof, changed its position by loaning Vaccaro an equal amount of money. It was not until one week after the termination of this transaction that the Bank had any notice or knowledge of Robbins. By then it was too late. The Supreme Court of the State of Arizona stated the rule very succinctly.

> "The rule is that money paid which might be otherwise recoverable cannot be recovered as against persons who have changed their position in good faith so that their original position cannot be restored. The blunder necessarily imposes a loss on someone, and it must be borne by the author of it." *Copper Belle Min. Co. v. Gleeson*, 14 Ariz. 548, at 556, 134 Pac. 285 (1913).

Clearly, had the Bank knowledge of Robbins' position before it made Vaccaro the loan and of the claimed restriction on the use of the Robbins funds, this whole situation would never have occurred. Robbins' failure to so much as contact the Bank in any fashion before releasing Thirty Thousand Dollars ($30,000.00) of its cus-

tomer's funds or in not notifying the Bank by telephone or wire before the transmittal of the money, makes it the author of the blunder and the loss should be borne by it.

CONCLUSION

It is submitted that the decision of the Circuit Court of Appeals for the Ninth Circuit is not in conflict with the decisions of this Court, the other circuits or the majority rule of the various states, nor does it present "clear error", and it is respectfully requested that the petition for writ of certiorari be denied.

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